

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MARK LEVEY,

Defendant and Appellant.

A118999

(Contra Costa County  
Super. Ct. No. 05-0511857)

David Mark Levey appeals from an award of victim restitution following his no contest plea to embezzlement of more than a million dollars, forgery, and attempting to file false or forged instruments. Levey contends the trial court improperly placed the burden of proof upon him to show that the victim claimed an excessive amount of restitution. He also argues that restitution was awarded for unauthorized losses, was improperly made payable to the individual victim rather than to the business entities that incurred certain losses, and that the lawyer who represented Levey in the restitution proceedings had a disqualifying conflict of interest.

We conclude that the court properly allocated the burden of proof and did not abuse its discretion in establishing the measure of restitution or directing that Levey pay it directly to his individual victim. Levey's representation was not impaired by a disqualifying conflict of interest that affected his defense counsel.

We agree with Levey and the Attorney General that the trial court erred when it failed to award the correct amount of conduct credits. Accordingly, we order that the

abstract of judgment be modified to reflect an award to Levey of four additional days of conduct credits, but in all other respects we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Levey and Michael Stead were business partners. Their ventures included Redwood Empire Restaurants (Redwood Empire), that owned a number of Taco Bell restaurants, and Double Eagle Enterprises (Double Eagle), that owned the real property underlying several of the restaurants and a condominium in Hawaii. Levey ran the day-to-day affairs of both businesses. As a result of an introduction facilitated by Levey, Stead also acquired a controlling interest in Vintner's Golf Club, LLC (Vintner's) through a limited partnership, Double Bogey, of which Stead was "one hundred percent owner."<sup>1</sup> Double Bogey purchased the interest of one of the shareholders of Vintner's operator Yountville Associates, LLC, and agreed to assume and pay Vintner's existing \$3.7 million loan owed to Wells Fargo Bank. As a result of the purchase, Double Bogey held a 55 percent interest, Yountville held a 42.5 percent interest, and Levey held a 2.5 percent interest (which he received as a finder's fee). Levey managed the operation of Vintner's, and was responsible for paying its bills and keeping its books and records.

In late 2002, Stead was notified by Wells Fargo that the Vintner's loan was in default. He then discovered that Levey had misappropriated more than \$1 million in checks Stead had written approximately two years earlier for the purpose of paying off the Wells Fargo loan. The bank also warned Stead of a "blizzard" of intercompany financial transactions. Stead contacted his attorney, who retained a forensic accountant to investigate why the Wells Fargo loan had not been paid as Stead directed. The forensic accountant uncovered a tangled web of complex fund transfers between various business entities that had concealed the precarious state of Levey's finances.

Stead confronted Levey, and Levey admitted the embezzlement but promised to repay the money. In February 2003, Levey and his wife entered into a restitution and security agreement (the RSA) with Stead and Vintner's. Levey agreed to repay Stead the amount of \$1.257 million (plus interest and other direct economic losses), and "also to

<sup>1</sup> Stead was the president of MCS Leasing, Inc., Double Bogey's general partner.

repay the costs of discovering the misappropriation and recovering the misappropriated funds and resulting loss, including but not limited to attorneys' fees, accountants' fees, costs of investigators, title fees and other costs . . . ."<sup>2</sup> The RSA was secured by interests in Levey's real and personal property, including his home. Levey continued to manage Redwood Empire and Double Eagle, but was removed from the management of Vintner's.

In June 2003, Stead's attorney learned that Levey had forged a deed of reconveyance for property that served as security for Levey's obligations under the RSA.<sup>3</sup> Stead then secured the appointment of a receiver to take over management of Levey's assets that were pledged as security for the RSA. Stead also learned the Taco Bell franchises were in default, and that Levey's businesses survived due to a "blizzard of kiting transactions back and forth between his multiple bank accounts." Stead advanced \$352,000 to keep the Taco Bells open, on the advice of an expert who opined they would be more valuable as an ongoing business.

Later that summer, creditors placed Levey in involuntary bankruptcy. The bankruptcy trustee attempted to hold Stead personally liable for some of the debts of the business entities Stead owned with Levey, and some of Levey's creditors brought (or threatened to bring) suit against Stead based on alter-ego and negligent entrustment theories.<sup>4</sup> To resolve the claims of his personal liability, Stead paid \$100,000 to Taco Bell, at the request of the bankruptcy trustee. The bankruptcy trustee ultimately settled with Levey's creditors, and some of the money owed to Stead was paid from the

---

<sup>2</sup> Stead's attorney later testified that, to his knowledge, Levey never voluntarily paid Stead "one penny" pursuant to the RSA.

<sup>3</sup> Levey apparently tried to extinguish a second deed of trust on his home that was to secure a loan made to Levey by William Duterte by forging documents that included a deed of reconveyance. The court also awarded \$154,757.74 to Duterte as restitution for losses incurred as a result of Levey's forgery of Duterte's signature on the deed of reconveyance. Levey's appeal raises no separate arguments regarding the award of restitution to Duterte.

<sup>4</sup> Stead's former wife also claimed during dissolution proceedings that Stead mismanaged the community estate with regard to businesses he jointly held with Levey.

bankruptcy estate, but Stead's attorney fees and other expenses incurred in obtaining payment remained outstanding.

Levey was charged with grand theft by embezzlement, with an enhancement for loss of more than \$1 million; forgery; and three counts of attempted filing of a forged instrument. He entered a no contest plea to all charges. The court suspended imposition of sentence and placed Levey on five years' probation, including a condition of one year in county jail.

The court held three evidentiary hearings on victim restitution, and received extensive briefing from the parties. Prior to the hearings, a restitution supplemental probation report was served on Levey's counsel. It reflects that documentation supporting the report was located in Levey's probation file. A victim claim statement and description of loss that Stead completed and filed with probation officials was admitted into evidence. Stead claimed he was owed over \$2 million in fees and costs. Levey argued that only \$111,290.45 of that amount constituted legitimate restitution, and claimed Stead had already been "overpaid" by almost \$30,000. In a detailed 27-page order, the court considered the evidence and legal positions advanced by the parties, and awarded Stead \$3,189,733.31 as restitution for his economic losses incurred as a result of Levey's criminal conduct. Levey timely appealed.

## **DISCUSSION**

### *A. General Legal Standards Regarding Restitution*

Section 28 was added to article I of the California Constitution by voters in the June 1982 primary election. Commonly known as the Victims' Bill of Rights, it gives all crime victims the constitutional right to receive restitution "from the persons convicted of the crimes for losses they suffer." (Cal. Const., art. I, § 28, subd. (b).) The Legislature subsequently "enacted various provisions to implement [section 28's] call for mandatory restitution from persons convicted of crimes to their victims." (*People v. Birkett* (1999) 21 Cal.4th 226, 236.)

Penal Code<sup>5</sup> section 1202.4 is one such enactment. Subdivision (a)(1) provides: “It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.” Section 1202.4 further provides, in relevant part: “[I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. . . . [¶] (1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. . . .” (§ 1202.4, subd. (f).)

“To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct, including, but not limited to,” lost wages or profits, 10 percent interest, and “actual and reasonable attorney’s fees and other costs of collection.” (§ 1202.4, subds. (f)(3)(D), (G) & (H).)

“A victim’s restitution right is to be broadly and liberally construed.” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 500-501.) “We review a restitution order for abuse of discretion.” (*Id.* at p. 498.) “ ‘When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.’ ” (*Id.* at p. 499.)

“California courts have long interpreted the trial courts’ discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction. . . . There is no requirement the restitution order be limited to the exact amount of the loss in which the

<sup>5</sup> All further statutory references are to the Penal Code unless otherwise indicated.

defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) The scope of a trial court’s discretion is particularly broad when restitution is imposed as a condition of probation. (*People v. Giordano* (2007) 42 Cal.4th 644, 663, fn. 7; see also *People v. Carbajal, supra*, at p. 1122 [article I, section 28 did not narrow the circumstances where restitution is proper or limit the court’s discretion to order restitution as a condition of probation.]

### *B. Burden of Proof*

Section 1202.4, subdivision (f) provides that restitution shall be made “in an amount established by court order, based on the amount of loss claimed by the victim.” Cases interpret section 1202.4 to place the burden upon “the party seeking restitution to provide an adequate factual basis for the claim.” (*People v. Giordano, supra*, 42 Cal.4th at p. 664.) No doubt in recognition that restitution is mandatory and a right extended to crime victims, that burden is not particularly onerous. It is met when the victim makes a prima facie showing of loss that is attributable to the defendant’s conduct. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) “Section 1202.4 does not, by its terms, require any particular kind of proof. However, the trial court is entitled to consider the probation report, and, as prima facie evidence of loss, may accept a property owner’s statement made in the probation report about the value of stolen or damaged property.” (*Id.* at pp. 1542-1543) “Thus, a victim seeking restitution . . . initiates the process by identifying the type of loss [citation] he or she has sustained and its monetary value. Where the restitution claimed is attorney fees, this requirement is met when the record contains prima facie evidence of reasonable attorney fees incurred by the victim to recover the economic losses.” (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.)

“Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim.” (*People v. Gemelli, supra*, 161 Cal.App.4th at p. 1543 [victim’s unverified statements of loss may serve as adequate factual basis for claim].) “This approach complies with the statutory mandate that the amount of

restitution is to be based on the ‘loss claimed by the victim’ and the designated right of the defendant to a hearing ‘to dispute the determination of the amount of restitution.’” (*People v. Fulton, supra*, 109 Cal.App.4th at p. 886.)

Levey argues it was error for the trial court to burden him with proving that Stead’s claimed losses were inaccurate. He seeks to distinguish the controlling authority that we have cited above with a citation to *People v. Harvest* (2000) 84 Cal.App.4th 641, 653, arguing that while mention of a victim’s claim in a probation report may satisfy due process notice requirements, it does not take the place of evidence of loss. But here, there was ample evidence of Stead’s losses. His victim claim statement and description of loss was admitted into evidence along with the legal bills and documentation of other costs he incurred pursuing Levey and his assets. Levey’s attempts to distinguish the applicable precedent are unpersuasive, and Stead’s prima facie evidence was sufficient to place the burden of proof on Levey to disprove the restitution claim. (See *People v. Gemelli, supra*, 161 Cal.App.4th at p. 1543; *People v. Fulton, supra*, 109 Cal.App.4th at p. 886; *People v. Foster* (1993) 14 Cal.App.4th 939, 947; *People v. Baumann* (1985) 176 Cal.App.3d 67, 81-82.)

### C. *The Attorney Fees and Costs Awarded as Restitution*

The trial court ordered Levey to pay more than \$1.2 million of attorney fees and costs incurred by Stead in his efforts to collect on the RSA. These fees and costs arose from the receivership placed over Levey’s assets, Levey’s bankruptcy case and Stead’s efforts to preserve and liquidate the assets that Levey pledged to satisfy his obligations under the RSA. Levey challenges most of these fees on two grounds. He argues they were not authorized under section 1202.4 either because they were not incurred to collect restitution or because they did not result from his conduct. We disagree.

The trial court’s award of these fees as restitution was supported by extensive testimony from Stead’s counsel that explained his participation in the civil and bankruptcy proceedings to preserve and execute on the assets that secured Levey’s

repayment.<sup>6</sup> He explained Stead’s decision to infuse capital into the business as necessary to maintain the assets as operating businesses to preserve their value for sale. He explained that “but for Mr. Levey’s defalcation there wouldn’t have been the collapse of the business, and Mr. Stead wouldn’t have been trying to preserve the assets to offset them against the amounts of money he had lost.” In counsel’s experience, the fees were reasonable given the complexity of the case, which he said was “the most difficult legal and business problem that I have faced in 30 years of doing this kind of work.”<sup>7</sup> (See *People v. Lyon* (1996) 49 Cal.App.4th 1521, 1525 [victim’s attempts to prevent dissipation of defendant’s assets that could satisfy restitution award were “proper, necessary, and a logical result of [defendant’s] criminal conduct,” and “an ‘economic loss incurred as a result of defendant’s criminal conduct’ [that was] the proper subject of an order of restitution”].)

When the trial court considered these claims, it said: “To state the obvious, and as Mr. Levey testified to at the restitution hearing, the ‘plan’ he and Mr. Stead came up with to reimburse Mr. Stead, was relatively simple and straightforward: sell the restaurant[s] (the ‘assets’), which meant the various Taco Bells he and Mr. Stead had a joint interest in, e.g., Double Eagle and Redwood Empire, and secure the repayment with Mr. Levey’s personal home, two condominiums in Hawaii and certain personal property. [¶] While the plan was simple in concept, its execution proved to be, in the words of counsel, ‘a mess.’ However, while the execution of the plan was convoluted, involving the appointment of a receiver to run the Taco Bell businesses, then the subsequent bankruptcy of Mr. Levey

---

<sup>6</sup> During the hearings, Stead’s attorney withdrew \$6,500 of claims based on certain bills that were mistakenly included with those related to preservation of Levey’s assets. Counsel’s posthearing brief pointed out two additional errors that totaled \$148,387.75. The court credited both sets of adjustments in its calculation of attorney fees owed as restitution.

<sup>7</sup> At another point, Stead’s attorney testified he had “never seen as many cross-collateralized, confused security interests and conflicting claims over simple assets, assets that were put into the wrong names, money taken from one account and put into another, confusing blizzard of kited transactions. It was truly a challenge of extraordinary proportions.”



and lawsuits by Atlantic Trust and others, one theme remains consistent: Mr. Stead was trying to preserve assets and do so as a prudent businessman would.” A victim’s efforts to preserve a defendant’s assets for purposes of effectuating restitution comprise an economic loss incurred as a result of the defendant’s conduct and may be the “proper, necessary and a logical” result thereof. (*People v. Lyon, supra*, 49 Cal.App.4th at p. 1525.)<sup>8</sup>

The trial court found that “to deny Mr. Stead restitution for these costs would be to fail to fully reimburse him for his economic loss.” Levey has not shown the court abused its discretion when it found that his conduct led to the need for a receiver and bankruptcy trustee to untangle and dispose of the assets involved. (See *People v. Baker* (2005) 126 Cal.App.4th 463, 469 [it was defendant’s misappropriation that led to difficulties in calculating the value of returned property].) We conclude the trial court’s findings were “rational, well reasoned, based on factual evidence presented at the hearing, and within its broad discretion.” (*People v. Mearns, supra*, 97 Cal.App.4th at p. 502.)

To the extent Levey argues that certain fees were improperly billed at attorney hourly rates or were duplicative and unnecessary, his objections were forfeited. He did not make them in the trial court and we will not allow him to raise them for the first time in this appeal. (See *People v. Welch* (1993) 5 Cal.4th 228, 234-235 [failure to timely object to probation condition waives claim on appeal]; see also *People v. Scott* (1994) 9 Cal.4th 331, 352-353 & fn. 15 [waiver doctrine applies to a challenge to trial court’s discretionary sentencing choices].) We also reject Levey’s attempt to analogize the alleged errors in the restitution award to “an unauthorized sentence which is not forfeited

---

<sup>8</sup> Levey’s reliance on a separate holding in *Lyon* that a defendant cannot be required to pay a victim’s legal expenses incurred to oppose the defendant’s criminal discovery is misplaced. (*People v. Lyon, supra*, 49 Cal.App.4th at pp. 1525-1526.) In *Lyon*, the court concluded the discovery expenses were not within the scope of the restitution statute because they were not incurred as a result of the defendant’s criminal conduct, “but rather from defendant’s defense of the criminal charges.” (*Id.* at p. 1526.) The *Lyon* court was concerned that “[t]o include this type of expense as victim restitution would, in our view, conflict with a defendant’s constitutional right to prepare and present a defense . . . .” (*Ibid.*) Levey’s arguments present no such issues or concerns.

absent an objection.” (See *Scott, supra*, at pp. 354-355; *Welch, supra*, at pp. 235-236; cf. *People v. Slattery* (2008) 167 Cal.App.4th 1091, 1094-1095 [unauthorized sentence concept is a narrow exception to the waiver doctrine when a “claim presents a legal question that is ‘clear and correctable’ by an appellate court without reviewing factual circumstances”].)

Levey also makes the argument that Stead could have avoided incurring attorney fees had he chosen to proceed with mediation under certain contractual agreements between himself and Levey, or used the criminal process to freeze and seize Levey’s assets under section 186.11. But the fact that there was an alternative possible strategy for Stead to secure Levey’s performance does not mean that the strategy he pursued was unreasonable. Moreover, there is no legal requirement that Stead rely on the district attorney to secure his recovery. (See *People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409-1410.)

Finally, we reject Levey’s argument that the attorney fees and costs were unreasonable. He relies on those cases that require a victim to offer evidence of the proper valuation of property that is damaged or stolen in order to fix an amount of restitution. (See *People v. Thygesen* (1999) 69 Cal.App.4th 988, 995 [victim was “not entitled to replace a used [stolen cement] mixer with a brand new one at appellant’s expense, absent some extraordinary facts”]; *People v. Yanez* (1995) 38 Cal.App.4th 1622, 1625-1627 [victim was not entitled to cost of repair that exceeded market value of stolen car].) They are inapposite. Here, Stead sought reimbursement of the expenses incurred in preserving and pursuing assets. This case involved no such issues of property valuation. The trial court did not abuse its discretion when it awarded attorney fees and costs as items of Stead’s restitution.<sup>9</sup>

---

<sup>9</sup> In light of our conclusion that the trial court did not abuse its discretion when it awarded Stead restitution under section 1202.4, we will not consider the Attorney General’s argument that restitution for these costs was also reasonable because it served the rehabilitative purpose of probation by holding Levey accountable for his attempts to conceal his insolvency and his embezzlement from Stead and his other creditors.

#### *D. Award of Restitution to Victim Michael Stead*

Levey says the award of victim restitution to Stead must be reversed because the business entities that Stead controlled, Double Eagle and Redwood Empire, were not direct victims of Levey's crimes. Thus, he says, the trial court wrongly relied upon alter ego theories of liability to compensate Stead personally for losses incurred as a result of the failure of those business entities.

We need not address whether the trial court correctly applied alter ego theories to order restitution to Stead for losses he incurred through Redwood Empire and Double Eagle because Levey entered a no contest plea to embezzlement of more than one million dollars from Stead. Stead's status as the direct victim of Levey's fraud is established by his plea and also memorialized throughout the RSA. In that agreement, Levey promised to make restitution to Stead of "the misappropriated funds and resulting loss, including but not limited to attorneys' fees, accountants' fees, costs of investigators, title fees and other costs." Moreover, it was specifically acknowledged in the RSA that the investigation into Levey's malfeasance could include "amounts related to Redwood Empire Restaurants, Inc. and Double Eagle Enterprises, LLC." As we have discussed, a victim's efforts to preserve assets to effectuate restitution may be a proper element of compensation in a restitution award. (*People v. Lyon, supra*, 49 Cal.App.4th at p. 1525.) Levey's claim that the trial court failed to determine that Stead was the direct victim of his crime because the court described him as the "real" victim is meritless. We'll not further indulge Levey's reliance on legal fictions or hair-splitting distinctions to vitiate his responsibility to provide restitution to Stead, the direct victim of Levey's embezzlement.

The trial court did not err when it awarded restitution to Stead for his own economic losses. (See *People v. Giordano, supra*, 42 Cal.4th at p. 657 ["a victim may recover economic losses that he or she incurred personally"]; *People v. Birkett, supra*, 21 Cal.4th at p. 233 [" 'actual' or 'direct' victims [are] the real and immediate objects of the probationer's offenses"]; *People v. Saint-Amans* (2005) 131 Cal.App.4th 1076, 1084 [our Supreme Court "has stated that the term 'victim' has a broad and flexible meaning"].)

### E. Defense Counsel's Alleged Conflict of Interest

The Sixth Amendment right to effective counsel encompasses a right to representation that is free from conflicts of interest. (*People v. Bonin* (1989) 47 Cal.3d 808, 834.) “When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter.” (*Id.* at p. 836, citing *Wood v. Georgia* (1981) 450 U.S. 261, 272.) To obtain reversal on the grounds that the trial court “fail[ed] to inquire into the possibility of a conflict of interest or fail[ed] to adequately act in response to what its inquiry discover[ed],” the defendant “must show that an actual conflict of interest existed and that that conflict adversely affected counsel’s performance.”<sup>10</sup> (*People v. Bonin, supra*, at pp. 837-838.)

Levey argues that his right to effective counsel was violated because one of the lawyers who represented him in the restitution proceedings had a potentially disqualifying conflict. He says the trial court’s failure to conduct a hearing into the nature of the conflict requires that the restitution order be reversed. Our examination of the record fails to disclose any reasonable grounds to conclude that Levey’s lawyer had a disqualifying conflict of interest or that the trial court inadequately acted upon disclosed information.

George Newhouse was one of the lawyers who represented Levey in the restitution hearing. At one time, Mr. Newhouse worked in the Los Angeles office of the McCutchen law firm. At all relevant times, Stead was represented by Edward “Doc” Merrill of Bingham McCutchen LLP, a successor firm to the McCutchen law firm. These facts first

---

<sup>10</sup> Levey argues that under the California Constitution, “even a potential conflict may require reversal if the record supports ‘an informed speculation’ that appellant’s right to effective representation was prejudicially affected.” (*People v. Mroczko* (1983) 35 Cal.3d 86, 91-92, 105 [single attorney represented two inmates charged with the murder of a third, as well as a witness who was an uncharged suspect].) But our Supreme Court has recently disapproved earlier cases “to the extent that they can be read to hold that attorney conflict claims under the California Constitution are to be analyzed under a standard different from that articulated by the United States Supreme Court.” (*People v. Doolin* (2009) 45 Cal.4th 390, 421.)

came to light when the trial judge disclosed at the outset of the preliminary hearing that he too had worked for McCutchen.

Levey now claims that Newhouse had a disqualifying conflict of interest “because of counsel’s divided loyalties to his former firm . . . [and his incentive] to preserve as much as possible his personal relationship with his esteemed colleague [Mr. Merrill] and his own business relationship with his former firm.” As evidence supporting this claimed conflict of interest, Levey quotes Newhouse addressing Merrill on the record as “Doc” and referring to him as “an esteemed colleague.”<sup>11</sup> He also claims that Newhouse could have more “abrasively” examined Merrill during the restitution hearing.

In spite of Levey’s claims and observations, the record as a whole demonstrates that Newhouse represented Levey with vigor and aggressively argued that the bulk of expenses sought to be included in victim’s restitution were not authorized under section 1202.4. For example, Newhouse chided Merrill for attempting to argue with him rather than answer his questions. He was openly critical of the McCutchen firm in his argument to the court, and generally advocated that Levey’s knowledge of the intricacies of various transactions was superior to that of the McCutchen lawyers.

“Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. [Citation.] [¶] Conflicts spring into existence in various factual settings. For example, conflicts may arise in circumstances in which one attorney represents more than one defendant in the same proceeding. [Citations.] In such cases there is at least the possibility that ‘the interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties’ [citation] and thereby undermine his loyalty to, or efforts on behalf of, one or all. Such a conflict, it is plain, can result in the infringement, or even the denial, of the defendant’s constitutional right to the effective assistance of counsel. [¶] Conflicts may also arise in situations in which an attorney represents a defendant in a criminal matter and currently has or formerly had an attorney-client relationship with a person who is a witness in that matter.” (*People v.*

<sup>11</sup> Newhouse actually referred to Merrill as “an esteemed attorney,” not colleague.

*Bonin, supra*, 47 Cal.3d at p. 835.) But as a general matter, “Any conflict between an attorney’s personal interest in obtaining employment and his or her client’s interest in loyal and effective representation is too attenuated to impute a violation of professional ethics in each such case.” (*People v. Clark* (1993) 5 Cal.4th 950, 996-997.)

The authorities Levey relies upon to demonstrate impermissible conflicts of interest bear no resemblance to the alleged conflict in this case. There is no suggestion that Newhouse and Merrill were close personal friends (State Bar, Formal Opinion No. 1987-93), or otherwise had a disqualifying personal relationship (*People v. Singer* (1990) 226 Cal.App.3d 23; *People v. Jackson* (1985) 167 Cal.App.3d 829). There is no claim of financial pressure on Newhouse that would temper his advocacy. (*Wood v. Georgia, supra*, 450 U.S. 261; *Walberg v. Israel* (7th Cir. 1985) 766 F.2d 1071.) There is no allegation that Newhouse had any prior fiduciary duty to Stead or Merrill, or that he was previously in a position to acquire confidential information from either of them. (*Lewis v. Mayle* (9th Cir. 2004) 391 F.3d 989; *Atley v. Ault* (8th Cir. 1999) 191 F.3d 865.) There is nothing in the record that discloses Newhouse’s representation of Levey was incompatible with any of his other professional responsibilities. (*People v. Rhodes* (1974) 12 Cal.3d 180.) Our research discloses no case where a conflict of interest was found to exist on a factual record that is similar to the one presented here.

In short, Levey claims the trial court should have conducted a hearing into a possible disqualifying conflict of interest because Newhouse once worked for the predecessor firm of Bingham McCutchen where Merrill is employed. It does not appear that Levey ever expressed concern about this alleged conflict during the proceedings in the trial court, and we are not surprised. As Shakespeare said of ambition, a charged violation of professional ethics should be made of sterner stuff. Levey knew of his counsel’s prior employment with the McCutchen firm as early as the preliminary hearing. There is nothing in the record that indicates counsel had a disqualifying conflict or that his past affiliation should have prompted the court to conduct a hearing.

F. *Conduct Credits*

Levey contends he was entitled to four days of conduct credits that were not awarded by the trial court. (See § 4019; *People v. Culp* (2002) 100 Cal.App.4th 1278, 1283.) The Attorney General concedes the issue. We will direct the trial court to amend the abstract of judgment accordingly.

**DISPOSITION**

The trial court is directed to correct the abstract of judgment to include four days of conduct credits, and to forward a copy of the corrected judgment to the California Department of Corrections. The judgment is otherwise affirmed.

---

Siggins, J.

We concur:

---

McGuiness, P.J.

---

Pollak, J.